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Supreme Court of the United States

October Term, 1947.

No. 371.

LOUIS KREIGER,

Petitioner,

AGAINST

HELENE KREIGER,

Respondent.

PETITIONER'S REPLY BRIEF.

JAMES G. PURDY,
ABRAHAM J. NYDICK,
Of Counsel.

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PETITIONER'S REPLY BRIEF.

Answering Point I.

Counsel necessarily ignores the cases cited on Point V of our main Brief which are later in point of time and conclusively establish that the quotation from *Harris* v. *Harris*, 259 N. Y. 334, is not an authority. *Karlin* v. *Karlin*, 280 N. Y. 32, and *Fox* v. *Fox*, 263 N. Y. 68, cited on page 16 of our main Brief state the law as it now is.

The *Durlacher* case, cited on page 9, and the old *Barber* case, cited on page 10, and the *Bassett* case, cited on page 14, have been analyzed on pages 36, 27, and 37 respectively of our main brief.

Counsel's reference to the case *In Re Thorn's Estate*, 46 A (2d) 258, 353 Pa. 603, is wholly misleading.

The issue there was whether the children of one Bullock, a collateral relative of deceased, were legitimate. The dispute arose by reason of the fact that Mr. Bullock in 1929 obtained a divorce from his wife in the Indiana

Courts after service of process upon his wife, a resident of Pennsylvania, by publication. Mr. Bullock had lived in Elkhart, Indiana, since 1920. After the divorce he married a woman by whom he had nine children before his divorce, and he admitted the paternity of the children. The Court held that the divorce was valid, that by his later marriage the children born prior to that marriage were legitimized, and that they were entitled to succeed to their father's interest in the estate to the exclusion of collateral relatives.

The only reference to the Municipal Court order is (pp. 609, 610) a statement that the former Mrs. Bullock had obtained such an order in July 1929, and that it was agreed that she be paid $1,000 yearly, and a decree was entered accordingly. Mr. Bullock made those payments, and it was argued on behalf of his collateral relatives that this support order and the payment of the money by Mr. Bullock was an admission that his divorce was invalid. This contention was overruled (p. 610) and the right of Mr. Bullock's children by his second wife was upheld.

Counsel for the respondent gives no answer to the majority opinion of this Court in *Esenwein* v. *Commonwealth*, 325 U. S. 279. The logic of that opinion is a complete bar to the acceptance of the argument advanced by the respondent on this point.

There are other "rights" founded upon the marital relationship which are involved in the principle urged by respondent and supported by the judgment under review. For example, in New York, a spouse has a personal right under Section 18 of the Decedent's Estate Law, to elect to take his or her share in the other spouse's estate as in intestacy, unless certain minimum provisions are made for him or her by the other spouse's will.

If the principle of *Estin* v. *Estin*, 296 N. Y. 308, is correct, obviously the spouse's personal right of election under the Domestic Relations Law is unaffected.

In New York, a conveyance of real property to husband and wife creates a tenancy by the entirety, and no act by one spouse can deprive the other of the right of survivorship. Yet that legal title is changed to that of tenants in common by a divorce.

Stelte v. *Shreck*, 128 N. Y. 263;
Armondi v. *Dunham*, 221 N. Y. App. Div. 87, 89.

Under the rule in *Estin* v. *Estin*, how can a divorce decree like that here affect the other spouse's right of survivorship in the real property owned by them as tenants by the entirety? If, however, the ex-husband survives, does he not have title to the exclusion of the ex-wife's heirs or devisees?

And what about the "personal" rights of either spouse in those states in which community property rights are recognized? Are they unaffected by a valid divorce such as was obtained by the petitioner and by Mr. Estin respectively, while they are affected by a divorce in which the other spouse was either served within the jurisdiction or appeared in the action?

Under the decisions of the New York Court here under review, we have a new class of divorce decrees. In addition to the long recognized limited divorce or separation decree and the absolute divorce, we have a mongrel limited absolute divorce, one which dissolves the marriage relation but purports to leave all the rights and duties appertaining to that relation untouched. It is absolute on its face but limited in its effect.

Such a decree is unknown to either Statute or the Common Law.

Answering Point II.

On this point respondent makes many erroneous conclusions as to the extent that Mrs. Kreiger's separation

decree was unconstitutionally ignored by the Nevada Court. No authorities are cited in support of those conclusions.

The New York Court of Appeals in *Estin* v. *Estin*, 296 N. Y. 308, upon the authority of which it affirmed this case, squarely held that the New York separation decree did not "disable" the Nevada Court from granting Mr. Estin "an absolute divorce."

Mr. Kreiger's decree was based upon the same law as was Mr. Estin's. Hence the same rule of law applies here.

Respondent's argument on page 19 ignores the basic difference in principle between an allowance of alimony in a separation decree, upon the continued existence of the marital status, and those contained in a divorce or annulment decree, based upon a statutory right created for that purpose.

The New York Court of Appeals assumed that it was giving to the Judgments of divorce in *Estin* v. *Estin*, and in this case, the same effect as they had in Nevada where they were granted. At 296 N. Y. p. 314 (p. 101 in the *Estin* case) that Court said:

> "Consequently, as we shall assume, the common law of Nevada does not differ in that regard from the common law of New York. (See *Read* v. *Lehigh Valley R. R. Co.*, 284 N. Y. 435, 441-442; Restatement, Conflict of Laws, §622). On that basis and in the light of *Barber* v. *Barber* (*supra*) we conclude that the full faith and credit clause affords no reason for disapproval by us of the decision reached herein by the courts below."

Presumably that Court had in mind the case of *Hanley* v. *Donoghue*, 116 U. S. 1, where at page 3, the opinion says:

> "By the settled construction of these provisions of the Constitution and Statutes of the United

States, a judgment of a state Court, in a cause within its jurisdiction, and against a defendant lawfully summoned, or against lawfully attached property of an absent defendant, is entitled to as much force and effect against the person summoned or the property attached, when the question is presented for decision in a court of another State, as it has in the State in which it was rendered. *Maxwell* v. *Stewart*, 22 Wall 77; *Insurance Co.* v. *Harris*, 97 U. S. 331; *Green* v. *VanBuskirk*, 7 Wall 139; *Cooper* v. *Reynolds*, 10 Wall 308."

By §391 of the New York Civil Practice Act, it is provided that:

"The books of reports of cases adjudged in the Courts must also be admitted as presumptive evidence of the unwritten or common law thereof."

and also that any Court

"may consult any of the written authorities above named in this section, with the same force and effect as if the same had been admitted in evidence."

This authorizes the New York Courts to take judicial notice of the Nevada decisions applicable.

The latest decision of the Nevada Courts applicable which we have been able to find is,

Herrick v. *Herrick*, 55 Nev. 59,

cited on pp. 21 and 22 of our main brief. It squarely held that a Nevada divorce ended the right of the woman to collect alimony under a pre-existing California decree of separate maintenance, for this reason

> "The dissolution of the marriage relation extinguishes the subject matter which forms the basis of an action or proceeding for separate maintenance" (p. 68).

There is no qualification nor any reservation in this clear and unequivocal language supporting New York's guess in the *Estin* case as to what the common law of Nevada is considered to be in that state. A dissolution of a marriage is just as complete when based upon the Nevada three year separation statute as when based upon adultery in New York.

Undoubtedly the Supreme Court of Pennsylvania in *Esenwein* v. *Commonwealth*, 348 Pa. 455, assumed that the Nevada law did not differ from that of Pennsylvania in the effect of a valid divorce decree upon the alimony provisions of a pre-existing support order or separation decree.

The New York Court of Appeals says that it assumes the Nevada law is the same as it argues it is in New York respecting that effect. The New York theory, however, was conceived after the decision of this Court in *Williams* v. *North Carolina* (First Appeal).

California presumably assumed the Nevada law to be the same as did the Pennsylvania Court when the former decided *Cardinale* v. *Cardinale*, 8 Cal. 2d 762, which considered a Nevada divorce obtained in the same manner as the ones obtained by Mr. Kreiger and Mr. Estin.

Nevada has made no distinction as to the effect of divorces upon alimony provisions of separation decrees when one is obtained by personal service within Nevada or personal appearance in the action, and when the other is obtained by default after service out of the state pursuant to statute.

The New York Court of Appeals hence was without justification in disregarding *Herrick* v. *Herrick*, 55 Nev. 59, in assuming that the Nevada Law is contrary to the holding in that case.

In *Tonjes* v. *Tonjes*, 14 N. Y. App. Div. 542, cited on page 29 of our main brief, the Court in considering a separation decree with alimony, said at p. 545:

> "It is to be borne in mind that the judgment does not dissolve the marriage contract. That still continues. The marital relation is so far modified by the decree, based upon the misconduct of the husband, that the wife is permitted to live separate and apart from the husband, and he is compelled to comply with the marital obligation to support and maintain. If the husband, while subject to this decree of separation, should obtain an absolute divorce, based upon the misconduct of the wife, it would then be clear that he would be discharged from the marital obligation of maintenance and support. If the decree of separation was final in this regard, then no power would exist in a court of equity to relieve the husband from its obligation. It would be a monstrous perversion of justice to say that the husband was bound by a decree resting upon the obligation to maintain and support, when by his judgment such obligation was swept away. Equity permits of no such result."

Bearing in mind that New York authorizes service of process by publication in divorce actions, the above quotation is a clear statement that a valid divorce decree obtained by the husband in New York, irrespective of the method of service of process, terminates the wife's right to collect alimony under a pre-existing New York decree. This clearly indicates that New York gives to its own divorce decree, obtained after service of process by publication, a larger effect than it has here given the divorce decrees of Mr. Kreiger and of Mr. Estin in *Estin* v. *Estin*. Briefly it refuses to give to a Nevada divorce decree the same effect as it would give to its own divorce decree upon a pre-existing separation decree made in this state.

By its decisions in this and the *Estin* case, it is manifest that the New York Court of Appeals does two things:

1. Refuses to give to the divorce decrees here the same force and effect as they receive in Nevada; and

2. Refuses to give the divorce decrees here the same force and effect which New York gives to its own divorce decrees.

In both respects that Court fails to give to these divorce decrees the full faith and credit required by Art. 4, Sec. 1, of the U. S. Constitution.

Answering Point III.

Mr. Kreiger never defied any legal injunction when he applied to the Nevada Court for his divorce. The "injunction" upon which respondent relies was based upon a complaint alleging that Mr. Kreiger was then a resident of New York (R. 35, 36); it was obtained *ex parte*, at a time when Mr. Kreiger had acquired a *bona fide* domicile in Nevada (R. 44) where Mrs. Kreiger admits he still resides (R. 57). There is no pretense that Mr. Kreiger was served in New York with either process or the injunction.

The cases here cited by respondent are manifestly not in point.

Ciacco v. *Ciacco*, 50 N. Y. Sup. 2d 398, was an *ex parte* application for an injunction and the court based its authority to grant it on his assumption that the defendant was at that time a resident of New York State, and that his claimed domicile in Nevada was "a sham and a fraud" (p. 23, Brief).

In the instant case it has been conclusively established that when Mrs. Kreiger began her injunction action, Mr. Kreiger was no longer a resident of New York, but had obtained a *bona fide* domicile in Nevada.

The "injunction" granted *ex parte* in that action without personal service on Mr. Kreiger in New York and without his appearance in the action had no more efficacy than had it been directed against a life long resident of Nevada.

The situation in *Palmer v. Palmer*, 53 N. Y. Sup. 2d 784, was different. There the separation action was pending and Mr. Palmer had interposed an answer. Hence he was legally before the court in the very action which granted the injunction, which it was empowered to issue by the New York Statute.

Respondent on page 23 cites *Goldstein* v. *Goldstein*, 283 N. Y. 146, as authority supporting the injunction. The New York Court of Appeals in that case reversed an injunction order and dismissed the complaint, which appears to have been based upon the same theory as was the complaint in Mrs. Kreiger's injunction action.

An injunction was also refused in *Baumann* v. *Baumann*, 250 N. Y. 382, cited by respondent.

The case of *Greenberg* v. *Greenberg*, 218 N. Y. App. Div. 104, considered the case of a New York resident who was applying for a Mexican mail order divorce.

The "injunction" was properly ignored by the New York Courts, where it was made. Here it is merely a smoke screen.

IN CONCLUSION.

The judgment under review should be reversed as prayed for on our main brief.

Respectfully submitted,

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